HER MAJESTY'S COURTS SERVICE (HMCS)

Part of the Ministry of Justice (MoJ)

REVIEW OF PART 6 OF THE CIVIL PROCEDURE RULES: SERVICE OF DOCUMENTS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

September 2007

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Stephen Lawson – APIL Secretary and Executive Committee Member
John McQuater – APIL Executive Committee Member

Any enquiries in respect of this response should be addressed, in the first instance, to:

Helen Anthony,
Legal Policy Officer
APIL
11 Castle Quay, Nottingham NG7 1FW
Tel: 0115 958 0585; Fax: 0115 958 0885
e-mail: helen.anthony@apil.com

Introduction

We welcome the opportunity to respond to the court service's consultation regarding the service of documents.

The consultation paper recognises that the current rules on service have been the subject of extensive litigation by the courts but and acknowledges that many of the problems caused by the rules have now been addressed. It says that *"In recent years, the rules of service have been the subject of a considerable amount of litigation and case law. This has served to clarify the law in most respects, but in some cases has produced results that may be considered unfair."*

The proposed changes, however, go a lot further than addressing the unfairness referred to above. In fact the stated intention behind the proposed reforms is to clarify and codify the existing law, and the changes set out in the consultation paper are significant, in terms of the layout and language as well content. Whilst we support the principle of clarifying the law, we are concerned that the changes will have the opposite effect. We believe they will cause confusion, lead to disputes and result in more satellite litigation. In our view it would be more practical to address the particular aspects of the law which cause concern rather than abandon the current rules and start with a new set.

Our answers to the questions below should therefore be viewed in the context of our belief that changing rules and the language used will lead to confusion, and our consequential view that there should specific reasons behind any changes that are made.

Consultation questions

1. **Do you agree that it is necessary to retain the principle that good service is effected if the claimant follows the procedural requirements for sending a document, regardless of whether it is actually received?**

   Yes, we agree that this principle must be retained. The rules ensure that the claimant makes comprehensive efforts to serve the defendant and provides protection for the defendant in the event that service does not actually take place. The principle provides certainty and makes it difficult for defendants to deliberately avoid service.

2. **Do you agree that the court's discretion to set aside default judgments provides adequate protection for the defendant? If not what further protections do you propose?**

   Yes, we agree that the court's discretion to set aside default judgements provides adequate protection for the defendant. The procedure allows a defendant to state his case to the court and gives him the opportunity to defend the claim, thereby effectively putting him in the position he would have been in if he had actually received the claim form. No further protection is required.

3. **Do you agree that a claimant should be required to carry out reasonable enquiries into the defendant's whereabouts before serving on an address that he knows is no longer current, but not otherwise?**

   We believe that introducing this rule could be problematic. It could lead to disagreements and ensuing satellite litigation over what *"he knows is no longer current"* means. For example, is actual knowledge required or is constructive knowledge sufficient?

Paragraph 15 of the consultation paper states that it would be possible to amend the rules to state explicitly what is meant by “reasonable enquiries”. As this is possible, we believe the new rule should set out the reasonable enquiries that a claimant is required to take in each case to identify the defendant’s current address, and allow service at on the defendant at his last known address if these enquiries are unsuccessful.

Setting out that the claimant must do x, y and z to try to identify the defendant’s current address before using his last known address in default is much clearer that leaving the definition of “reasonable enquiries” open to interpretation. It is also a more practical way of ensuring documents actually reach defendants. The rule proposed in the consultation paper would encourage claimants ignorant of any change of address to remain so, with the consequence that substantive proceedings and therefore an effective resolution of the case are likely to be delayed.

4. **Where the claimant knows that the defendant no longer resides or carries out business at the last known address, should they be required to consider alternative methods and, if appropriate, to apply for the court’s permission?**

We do not believe that it is necessary to introduce this rule. If a claimant knows that a defendant’s address is not current, he will usually consider applying to the court for service by an alternative method in any event. It is more useful to the claimant to know that the defendant has actually been served, than risk non-service, an application for judgement in default and a subsequent application by the defendant to set aside default judgment. This incentive is more practical than a rule that would be difficult to enforce, as is the proposed rule which would require the claimant to “consider” alternative methods of service and apply to the court “if appropriate”: both these concepts are entirely subjective.

Furthermore, if the If the rules explicitly stated the reasonable enquiries that should be carried out to attempt to locate a current address for the defendant, but allowed the defendant to be served at his last known address where a current address can not be found (as proposed in our answer to question three above) such a requirement to consider alternative methods of service would not be necessary.

5. **Do you agree that the time limit for serving the claim form should apply to the time within which the claimant must despatch the claim form after the date of issue? If not please explain why not.**

   We are concerned that if the rule is changed to the time within which the claim form must be "despatched", further satellite litigation will ensue.

   A deemed date of service allows for clarity and certainty. The circumstances described in the consultation paper, where defendants have actually received a claim form before expiry of limitation but were only deemed to have received it after the expiry do raise complex issues, but changing the rule would merely lead to confusion and this will not be of benefit to any party involved in litigation.

6. **Should there be a standard period for determining the date of deemed service date for all methods of service, for example 2 days after despatch (being the longest current period)?**

   We do not think that a standard period for determining deemed date of service is appropriate. The existing rules make it clear that there are different time periods for different systems of service.

In addition, allowing two days for deemed service of documents which are delivered almost instantaneously would perhaps unfairly and unintentionally extend the period within which the recipient must respond to the document being served.

7. **Do you agree that deemed service should take place on a business day? If not please explain why not.**

We can see advantages and disadvantages to service being deemed to have taken place on a business day only.

In most cases it is fictitious to assume that service will take place on a Sunday or Bank Holiday (the rare exception being where a document is personally served on one of these days). That it is a fiction should not, however, mean that service should not be deemed to take place then as the entire practice of deemed rather than actual service is based on supposition and averages in any event.

In addition, there is a significant advantage in counting calendar days in order to work out when service was deemed to have take place. Counting calendar days is straightforward; counting business days, which requires consideration of what a business day is (and particularly what a bank holiday is) and when these fall, is more complicated.

It would therefore be easier to deem service after a set number of calendar days, but more realistic if it was limited to business days (the definition of which must be clear).

Whichever ever term (“business day, “calendar day” or simply “day”), it should be used consistently throughout the CPR and its meaning clearly defined.

8. **Should the deemed served date for e-mail be in line with fax service i.e. on that day if its transmitted on a business day before 4.30pm, or in any other case on the next business day? Please give reasons for your view.**

We agree that the time for deemed service should not differ depending on whether service was by fax or by e-mail.

We do not, however, think it is necessary to amend the 'cut off' point to 4.30pm. Whilst we have no objection in principle to the time being later, we do not think the change is necessary, and think this may just be change for change's sake, rather than serving any real purpose.

9. **Should postal service be limited to first class or equivalent services, or should any postal service be allowed? In the latter case, how much extra time (if any) should be built into the deemed date of service?**

We believe that postal service ought to be limited to first class or equivalent services. This does not place too onerous a requirement on the claimant.

10. **Do you think that service on an e-mail address should be allowed as the same basis as service on a fax address (e.g. if the e-mail appears on the legal representatives letterhead)? If not are there any alternative options?**

E-mail is an extremely useful method of serving documents. Any provisions which allow for service on an e-mail address must, however, be clear and allow a party or his legal representative to opt-out of being served in this way.

We believe this reservation is necessary because the receipt of messages electronically is distinct in nature from receiving messages on paper (whether through the post or by fax). Documents served by e-mail may easily be caught up amongst unwanted mail or 'spam', whereas documents served by fax and post are likely to be more easily identified as important.

11. **Should the court be given the power to order retrospectively that service by an alternative method is valid? Please give reasons for your view.**

We believe that the court should be given the power to retrospectively order that service by an alternative method is valid. Allowing the courts this flexibility would further the overriding objective of enabling the court to deal with cases justly.

12. **Do you agree, in principle, that the methods of service of claim forms or other documents on defendants in Scotland and Northern Ireland (in proceedings commenced in England and Wales) should be those permitted in England and Wales, without reference to the methods of service permitted under the procedural laws of Scotland or Northern Ireland respectively? If not, why not?**

Although the proposal to allow service in Scotland and Northern Ireland by methods permitted in England and Wales is attractive to claimant lawyers as it would make their jobs easier, we think it is wrong in principle. Scotland and Northern Ireland are different jurisdictions: the question of service on residents there is a matter for the authorities in those jurisdictions alone.

13. If so, should this extend to personal service (by the claimant or his agent or solicitor)?

Please see the answer given to question 12 above.

14. Do you think in respect of property claims it should be possible to effect service of a claim form at a relevant address in England and Wales on the Land Register or an address given under s.48 of the Landlord and Tenant Act 1987? If not, why not?

Although APIL's remit does not extend to cover property claims, we think that the provision of an address on the Land Register should be valid as an address for service in personal injury (and other non property) claims.

An address lodged with the Land Registry is an official notification of where a property owner can be located. It would seem sensible to introduce a principle that such an address may be used for service of documents (unless a different, current address is known) for all types of case. Indeed it would be logical and helpful if checking the land registry for an address is specified as one of the reasonable steps we refer to in answer to question three above.

15. Should a party be able to give an address for service anywhere within the United Kingdom? If not, why not?

It would be unjust to allow parties to give an address for service anywhere in the United Kingdom if the same methods of service were not allowed. It would put parties within the jurisdiction and outside of it on a different footing.

16. Should a party be able to give an address for service anywhere within the EU? If not, why not?

No. The answer to question fifteen above is relevant here. In addition, provision of an address for service within the EU may lead to practical problems which make service of urgent documents difficult.

17. Do you think that a party should be able to provide up to three addresses for service of which at least one should be a postal address within the UK (or EU)? If not, why not?

Allowing a party to specify a number of addresses for service rather than just one has the potential to lead to significant confusion and disputes. If three addresses are provided, must documents be served on all three, or is one sufficient? If it is the latter, then the receiving party does not know on which of the three addresses the court documents will be served: although he may prefer to be served by e-mail, there is no guarantee that the party serving him with the documents will do this. If it is the former, it would seem an unnecessary administrative and costs burden to have to serve up to three copies of the same documents on the same party.

18. Do you agree that the time limit for filing a certificate of service of a claim form should be changed from 7 days to 14 days to align it with the period for acknowledgment of service? Is a certificate of service necessary when an acknowledgment of service has been filed?

We believe there should be no requirement to file a certificate of service at all unless the claimant wants to apply for judgment in default, when of course he must show that the defendant has been correctly served.

A certificate of service is not necessary when an acknowledgement of service has been filed. It is of no benefit to the court as the fact of the acknowledgment notifies the court that the claim has been received by the defendant. A certificate of service must be accompanied by copies of the sometimes bulky document that has been served. This wastes time, costs and paper when an acknowledgment of service tells the court that the defendant is aware of the claim.

There would not be any benefit in extending the current seven day time limit to 14 days. Even if an acknowledgement is filed, the claimant will not usually know this until after the expiry of the 14 day time limit.

The court only needs to know that the claim form has been served when it is being asked to take action, and only at this point should a certificate of service need to be filed.

19. Should references in Part 6 to solicitors be replaced by references to any authorised litigator? If you think not, please give reasons for your view.

We agree that the term should be changed to harmonise the language used.

20. Do you agree that judicial review claims against the Crown should be served in the same way as civil proceedings against the Crown, in that service must be on the relevant solicitor for the particular Government Department as set out in the list of authorised Government Departments annexed to Part 66. If not please explain why not.

It seems sensible and reasonable to harmonise the procedure for service of documents on the Crown.

21. Are there other categories of judicial reviews where it would be desirable and practical to specify addresses for serving judicial review claim forms?

Judicial review proceedings related to personal injuries are rare, but do occur. It would be useful not just in judicial review, but also in other types of case, for there to be a list of local authorities' address for service. This would save time and cost by allowing claimants to identify the address on which to serve local authorities easily.

22. Should the distinction between the county court and the High Court be removed so that a judgment creditor who is an individual litigant in person has the option to effect personal service personally in all courts?

Yes, we think the distinction should be removed.

23. Do you have any comments on the proposed draft of Part 6? Please state what these are and give reasons for your views.

We note that some changes to the wording, which are not specifically addressed in the questionnaire, are proposed. We believe changes should only be made where these are identified as necessary and such changes should be specifically addressed by the consultation paper.

We reiterate our view that introducing new terms (e.g. "despatch"), changing language (e.g. the proposal that a claim form "may" be served by a method specified in a contract, rather than "shall" be served in the specified method") and restructuring the rules will lead to disputes and satellite litigation.

Finally, we submit that the table contained in the draft practice direction regarding service out of the jurisdiction contains too many different time periods.

Instead of having over fifteen different time periods, ranging from 21 to 50 days, we believe that there should be three or four. A generic system with a set number of days for service for each region of the globe would be easier to use. We suggest the Royal Mail system (which assigns each country to Europe, World Zone 1 or World Zone 2) or similar could be used and a set number of days for service specified for each group. It would still be useful for the countries to be listed, in alphabetical order, within each group.

It would also be sensible to set the number of days in multiples of seven, so that this is consistent with parts nine and ten of the practice direction, which refer to 14 and seven days respectively; it is also easier to calculate the number of weeks within which a document must be filed at the court, rather than the number of days.

By way of illustration of our preferred approach, we set out an abbreviated alternative table below.

Zone 1	Zone 2	Zone 3	Zone 4
21 days	28 days	35 days	49 days
Armenia Austria Balearic Islands Belarus Belgium ...	Abu Dhabi Afghanistan Albania Algeria Angola Antigua Argentina …	Anguilla Antilles (Netherlands) Ascension Island Caroline Islands Cayman Islands Falkland Islands Faroe Islands …	Cocos (Keeling) Islands New Zealand Island Territories …

We believe that this system would be much easier to use in practice.